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Non-Traditional Students and Critical Pedagogy: Transformative Practice and the Teaching of Criminal Law¹

Introduction

Traditionally, a student wanting to pursue a legal career in the United Kingdom would need to enrol into a three years undergraduate course, the Qualifying Law Degree (QLD); only thereafter, the graduate law student would have a taste of the legal profession by taking the one-year training called the Legal Practice Course. The two courses are worlds apart, and the need to complete both has been questioned in the past. In particular, it has been suggested that those core topics which have to be taught on the QLD such as criminal law, tort and property law, little aid, if at all, to a concrete and practical understanding of the law in these areas, when a student then takes the Legal Practice Course. The aim of this paper is to engage with the recent discussion about whether the teaching of criminal law should continue to be part of the QLD. Fitzpatrick has provided a critical discussion in that regard (2013), highlighting, among many other key issues, the need to reflectively consider what our students get out of learning a doctrinally-based topic which barely reflects, if at all, the nitty-gritty of the legal system. The article will first look into Birkbeck London University's commitment to widening participation and thus to non-traditional students as an important aspect of this; the scope of legal education for non-traditional students within the framework of widening participation will be addressed. Next, considerations will be given to the implications suggested by the widening participation agenda to the QLD studies, transferable skills and the legal-job market. Then, within the context of criminal law teaching, an assessment of the connection between non-traditional students and critical legal pedagogy will take place. By addressing Fitzpatrick's question as to whether criminal law serves a purpose sufficiently important to merit inclusion, I argue that this is justifiable through what has been termed as 'student transformative practice'; that is, the student experiences fundamental growth through seeing things differently. I submit that this transformation can take place especially through the teaching of criminal law (within a critical legal framework) because of its intrinsically moral, social and politically challenging nature. This is not only

¹ A version of this paper was initially produced for a teaching workshop organised by Birmingham University, 2014. The workshop was titled 'Re-Imagining the teaching of Criminal law', meaning to explore a number of teaching approaches across the board. See Centre for Professional Legal Education and Research, Working papers <http://www.birmingham.ac.uk/facilities/CEPLER/working-papers/index.aspx> (accessed 19 Aug 2015).

intellectually important but also essential in this fast changing world where varied and different individual realities clash and merge at the same time.

I

In an interview with *The Telegraph* (July 8, 2012) the Supreme Court Justice Lord Sumption said that ‘the problem is that we have a generation of lawyers, who are coming into the profession with much less in the way of general culture than their predecessors’. Lord Sumption’s assertion voiced a concern that the legal education community was already familiar with. Nowadays, the educational paths available to enter a legal profession as a solicitor or a barrister are more flexible (BSB 2016; SRA 2014); the debate at stand, however, relates to the traditional academic training acquired through the QLD. The QLD is an undergraduate law degree (2-4 years) shaped by the Joint Statement (1999 [as amended]),² which requires the successful completion of specified ‘foundation subjects’;³ this assures a certain quality standard of all QLD across the country but it also guarantees that once students embark on the vocational stage of a law profession (BSB 2016a; SRA 2014a), it can be safely assumed that they have gained some understanding of core areas of law.

Lord Sumption’s criticism of the QLD course reveals the concern that the learning experience provided in the law programme over-emphasises the substantive law, that is, the doctrine of the law (e.g. technical rules of application), rather than equipping students with an understanding of the social background to legal problems (*The Telegraph*, July 8, 2012). Some legal academics have argued that the learning outcomes identified by the Joint Statement (1999), are far too narrow; where these have subsequently limited the development of law curriculums to embrace wider ‘considerations of the role of law in society, questions of legal ethics, links between areas of law and practice’ (Smith et al. 2012, 9). This has proved detrimental, according to Lord Sumption, because law graduates appear to lack ‘a command of reasoning skills, an ability to understand and use evidence, and broad literary culture’ which are ‘all tremendously valuable to any advocate’ (*The Telegraph*, July 8, 2012). More recently, the above debate has specifically touched upon the effectiveness of the

² The Joint Statement was created by the Joint Academic Stage Board. This includes representatives from academia, the Solicitor Regulation Authority and the Bar Standard Board, <https://www.barstandardsboard.org.uk/qualifying-as-a-barrister/academic-stage/joint-academic-stage-board/> (accessed 15 Apr 2016)

³ The Foundations of Legal Knowledge are: Public Law, Law of the EU, Criminal Law, Obligations, Property Law, and Equity.

teaching and learning of the foundation core subject of criminal law. Possibly because the study of criminal law is far more technical and remote from its actual professional practice than any other subject (Fitzpatrick 2013a), some attendees in the Solicitor Regulation Authority's "Training for Tomorrow" event have considered that criminal law is indeed a subject which could be excluded from the QLD (Fitzpatrick 2013).

Such a discussion has particular bearing when the student is a non-traditional one, such as in the case of Birkbeck London University; this is because it could be argued that students' expectations and learning experiences are now shaped by factors which the traditional law programme did not need to deal with previously. Therefore, in order to engage with Fitzpatrick's question 'what is it that our students get out of the learning of a doctrinally-based discipline?' (2013) it is essential to first understand the nature of Birkbeck's non-traditional student, how Birkbeck engages with this student-population, and then more specifically, understand what is or should be the purpose of the QLD. As a starting point, it is essential to clarify that the majority of Birkbeck's students for the QLD have not recently completed their secondary school qualifications and they are not financially supported by their parents (although they themselves might financially support their own children); for many, this qualification, whether leading to a legal career or not, is perceived as a 'second chance' and possibly life changing.⁴ This student-population became known as 'mature students', those students who have joined university in a later stage of their personal and even professional life.⁵ Indeed, for the academic year 2015/16, 85% of Birkbeck's law students were above 21 years of age, while the prominent age group was 31-40 years of age; 17% of the students were within the 41-50 age group, 7% in the 51-60 age group, and 2015/16 even recorded 2% of students above the age of 61 (Birkbeck 2016). Cottrell (2001) draws attention to the fact that many of these students are in essence 'mature' in their age, life and work experience as well as skills. However, nowadays, students who juggle work with family commitments and studies might also be in their early 20s, and thus the concept 'non-traditional' better describes the (a)typical Birkbeck student. Moreover, teaching in the

⁴ See for example students testimonies in Student Profiles on Birkbeck School of Law web-page, 2016, <http://www.bbk.ac.uk/law/study-here/student-profiles?next=10&prev=0> (accessed 29 Feb 2016); also, see relevant statistics on Birkbeck's students, Birkbeck Statistics Book 2010/11, Chapter one and two, <http://www.bbk.ac.uk/committees/committee-papers/committees-and-working-group-archive/governors-committee-archive/20111130/statsbook> (accessed 29 Feb 2016)

⁵ Currently, mature students are those above the age of 21 (UCAS, Mature Students' Guide, 2015, <https://www.ucas.com/sites/default/files/Mature%20guide%202015.pdf> (accessed 29 Feb 2016))

Birkbeck environment and engaging with students reveals that the ‘non-traditional’ aspect embraces also the fact that the students are diverse socially and culturally.

Birkbeck’s commitment to the adult-non-traditional student has further been emphasised through what is termed as Widening Participation (WP), aiming at encouraging under-represented social groups to enter into higher education (Jones 2008). Indeed, Birkbeck’s Mission Statement focuses its attention on the ‘adult student’, stressing that its aim is to ‘provide part-time higher education courses which meet the changing educational, cultural, personal and career needs of adults’ (Birkbeck 2016a). Moreover, reading Birkbeck law students’ testimonials it becomes apparent that Birkbeck’s aim to allow its students to integrate their studies with full or part-time employment as well as family commitments, hence scheduling teaching hours mainly in the evenings or weekends, played an important part in the successful completion of the courses taken (Birkbeck 2016b). However, the importance of WP and subsequently, the non-traditional student’s effective learning experience goes beyond the mere flexibility of teaching hours. In particular, in light of the introduction of the student fee reforms in 2012, Birkbeck has been engaged in further supporting and maintaining the access of mature students to HE. Its first engagement was to create in 2013 the Centre for Transformative Practice in Learning and Teaching. The centre is aimed at enhancing teaching practices in order to ‘ensure that Birkbeck students have the best possible experience of flexible learning, which will in turn support retention and student success’, whilst also enhancing ‘pedagogic approaches for learners and the development of critical practices for practitioners and professional’ (Birkbeck 2015, 10; Birkbeck 2015a). Birkbeck has further consolidated its approach by constituting the Student Engagement Committee and its subsequent strategy for 2015-2020, and Birkbeck’s Access Agreement 2015/16.

Indeed, the teaching of non-traditional law students involves an aspect of ‘conversation’; whatever the subject of discussion is about, one can reasonably expect that at least some of the students will have an opinion, a perception or even better, a firsthand experience which they can draw upon. Moreover, it has been recognised that although many of these students are interested in pursuing a legal career, many others will have a different agenda. Indeed, the attractiveness of legal studies is not strictly confined anymore to those enamoured with the legal profession; the reasons behind enrolling on such a demanding course may vary enormously, from merely functioning as a stepping stone for a career

progression or a career change, a pastime or a hobby, the pursuit of a ‘life dream’, or an opportunity for social interaction. Indeed, the Higher Education Academy research findings on career expectations of law students found that the first reason for studying law was an interest in the subject (which does not necessarily mean that the student intends to practice law), while the second most important reason was the desire for intellectual stimuli. In terms of future career intentions, the research found that although about 60% of the students intended to become barristers or solicitors, the rest of the sample was either ‘unsure of career intentions’ or would be using the law degree in a non-legal occupation (Hardee 2014, 11-12, 35).

It could be argued, therefore, that in light of such a diverse non-traditional law-student population combined with such diverse study and future prospects, the question as to the validity and effectiveness of a QLD and foundation subjects which are technical and to some extent detached from practical reality, is particularly relevant. Possibly, awareness on that regard was set in motion by the 1997 Dearing report on higher education. The report highlighted a valid consideration: it suggested that many students will not find the pursuit of a narrow field of knowledge ‘attractive, nor useful in career terms, nor suitable’; and that in a rapidly changing world, ‘the nation will need people with broad perspectives’ (Dearing 1997, cited in Thomas 2000, 4). The Legal education and Training Review (LETR), 2013, further looked into the question of whether the law students should be educated to ‘think like a lawyer’, or encouraged to acquire ‘a broad liberal’ knowledge. Indeed, the Birkbeck School of Law brochure emphasises that the School’s aim is ‘to provide an education in law that is critical, questioning and creative, producing graduates who not only have knowledge of the relevant skills, rules and principles of law but are equally aware of the social, political, economic, philosophical and ideological aspects of the legal art’; the brochure goes on to reassure that ‘whether Birkbeck graduates go on to practice law, research, teach, or enter into different areas of work, we believe the training they receive will enable them to make the most of their opportunities and achieve the results that they desire’ (2016e, 9).

II

At the core of this paper is the argument that non-traditional students go through a ‘transformative’ learning experience; transformative to their knowledge, being and self, as well as to their profession. This, as it will be argued shortly, can be encouraged through the

implementation of critical pedagogy and critical legal education. However, although transformative practice is a well grounded perspective, especially related to adult education, it has been recently used as a marketing slogan. For example, the Birkbeck website addresses prospective students by saying: “Birkbeck is unique. People have been changing their lives here for almost 200 years” (Birkbeck 2016c). The prospect of transforming one’s own life through the pursuit of education, and using this information to attract students especially within the context of WP, might be seen as embracing the higher objective of education, almost a social obligation, which according to Freire is the promotion of ‘authentic democracy’ (Freire 1974, 35). However, 21st century English HE reality is highly complex, revealing a possible conflict between the genuine nature of transformative practice and the new nature of education, now seen as a commodity.

Consumerism and its reflection on education has been discussed at length by a number of academics (see for example Brown 2015; Leathwood and O’Connell 2003; Jarvis 2004), but it is essential to make a number of specifications in order to see how critical and legal pedagogies can, and perhaps should, fit within this controversial educational framework. In short, it has been with the recent changes in HE policy and funding that Leathwood and O’Connell argue that the student is seen now as ‘an active consumer of educational services’ (2003, 599). The sense that the ‘consumer is always right’ has created pressure on universities to satisfy individual demands to provide the guarantee that at the end of this expensive process, job prospects can be secured (Smith et al. 2012). It appears that this is particularly relevant in the case of the non-traditional law students. This is because buying into education might involve financial hardship accompanied by the sense that ‘they have to get it right’, not least because, this being for many such a life changing experience, the sacrifices they have taken have to pay off (Archer and Hutching 2000). Indeed, the building up of expectations is inevitable when prospective students can read in Birkbeck School of Law’s ‘Why Study Here?’ that ‘Birkbeck was found to have the highest average graduate salary of any university in the UK and 95% of our students are in employment or further study 6 months after graduating’ (Birkbeck 2016d).

QLD programmes have also been affected by recent changes brought about by the Legal Service Act 2007 (gaining full effect in October 2011). Within this context, the new legislation has embraced the recognition of the effects of globalisation such as new legal service markets, new service providers, information technologies and communications (Smith

et al. 2012). Subsequently, the need to better tailor legal education to meet the above requirements was expressed with the recommendations provided by LETR in 2013. It could be argued that accidentally, LETR responded to the needs of the new legal-job market whilst at the same time targeting the needs of the non-traditional law-student by stressing that legal education should emphasise aspects such as ‘employability’ and ‘transferable skills’. Indeed, the most recent Quality Assurance Agency’s (QAA) report for law has amended its Benchmark Statement so as to reflect ‘contemporary issues in learning [...] and to reflect the need to add employability skills’ (QAA 2015, 5). Moreover, the new Statement further advises that ‘in addition to the general intellectual training that they provide, law degrees give a preparation for a range of careers. Law students are employable not only in the law but also in a variety of highly skilled and analytical roles in, for example, business, finance, education, public policy, public service, social services in the UK and internationally.’ (QAA 2015, 6)

Academics and educators have accepted the above described state of affairs not without reservations. Universities had no choice but to immerse themselves in this neo-liberal framework, where it has been argued that typical concerns of market ideology such as value for money, consumer choice and quality are the new drivers of the administration of higher education (Brown 2015, 6). In Brown’s words, universities have to either ‘respond to their [students’] needs and preferences or lose custom’ (2015, 5). Issuing from the above preoccupation is the suggestion that as a consequence, education, seen now as an economic good, ‘is inimical to the broader liberal notion of higher education being about the intellectual (and moral) development of the individual [...]’ (Brown 2015, 7). Moreover, Giroux goes as far as defining education under this framework as neo-liberal pedagogy, where it reduces ‘citizenship to the act of consuming’ (2012, 8). This has also struck a cord within the legal education system: not only has legal education been a battlefield since the 1980s in which orthodox liberal legal education and critical legal education have found fault with each other’s attempts to ‘teach the law’, but also, following the recommendation provided by LETR and the QAA, legal pedagogy has found itself stuck between the hammer and the anvil. Indeed, Sommerland et al. argue that the new legal education requirements have emphasised the ‘tensions between employability and the liberal arts education’ (2015, 4). In other words, and perhaps in agreement with the concern voiced by Lord Sumption and introduced at the beginning of this paper, the study of law is now ‘market driven’ towards the acquisition of vocational skills, where the understanding of what, for example, ‘justice’ and

‘rights’ are or should be, has acquired a marginal space in the engagement that students have with this profession (Sommerland et al. 2015).

Within this educational context, where it could be argued that the new higher education paradigm has created a generation of market-dependant students and employment-focused curriculums, it is perhaps difficult to see how the core principles driving critical pedagogy and critical legal studies fit here. It could also be argued that traditional pedagogies and traditional legal education better suit this framework, where they do not necessarily need to engage with problematic matters such as values, ethics and power, whilst reducing students, according to Giroux, to ‘cheerful robots’ (2012, 3). So, why does emphasising the importance of critical pedagogies matter? Why does promoting critical legal thinking matter? It could be argued that the answer to these questions lies in the competitive legal-job-market itself. Although the new legal education framework has recommended a greater focus on vocational training so as to respond to the needs expressed by the globalised legal-job-market and the globalised consumer, it would be misleading to argue that law firms would be merely satisfied by the cheerful robot product of conventional education. WP has not only opened up the doors of higher education to a greater number of non-traditional law students, it has also and inevitably created a surplus of law graduates, at least half of which will attempt to elbow their way into a traditionally restricted, reserved and competitive profession (Sommerland 2007). In his presentation to Birkbeck’s law students, solicitor Paul Ridge from the Bindmans LLP, made it clear that his firm does not simply look to employ ‘very good’ or ‘excellent’ law graduates. Rather, the search is for the ‘brilliant’: those students who are mindful of legal and social issues and can think and act on their feet. A similar conviction was voiced by the solicitor Ben Henry, the barrister Kevin Saunders and Queen’s Counsel and barrister Michael Burrows (2014); according to them, a narrow field of knowledge does not lead to good employment prospects: the wider the legal practitioner’s socio-legal contextual knowledge is, the better. In addition to that, it is also essential to remember that at least half of the law students are not interested, a priori, in pursuing a legal career; hence the pressing need to guarantee an intellectually effective and rounded learning experience.

III

Turning the focus of discussion back to the journey of learning in order to understand what Birkbeck’s students can gain from the QLD in general and the study of criminal law in particular, I suggest that critical pedagogies and critical legal thinking can produce a learning

experience which responds to the new requirements of LETR and the QAA while also encouraging an intellectually engaging learning experience leading to ‘transformative’ practice. First, however, it is helpful to consider how critical pedagogies can fit within a HE framework which, it has been argued, is of a neo-liberal nature and is therefore nemesis for these critical pedagogies. In particular, the concept of ‘employability’ will be considered here. Despite the tension created by the new higher education and legal education framework, Fitzpatrick (2013b) encourages seeing ‘employability’ within the wider meaning of personal development, rather than merely seeing oneself as ‘becoming employable’. In particular, Fitzpatrick argues that transferable and employability skills-training should emphasise self-reflection and self-awareness, engagement with values, critical thinking and the understanding of uncertainty and adaptability within the ‘fluid context of legal service’. Also according to Giroux, critical pedagogy in itself can be seen as promoting ‘gainful employment’ while at the same time nurturing a society (which includes inevitably employers and employees) that ‘takes equality, justice, shared values and freedom seriously’ (2012, 4). Understood within this wider context, the law curriculum becomes connected to life, because, as Freire stated, those curriculums which centre ‘on words emptied of the reality they are meant to represent [...], could never develop a critical consciousness’ (1974, 37). Indeed, the use of critical pedagogy and critical legal teaching, especially within the 21st higher education framework, is important because they keep consciousness alive and help to dismantle social boundaries (Amsler 2010).

So how is it, then, that these pedagogies can make the QLD and the study of criminal law worthwhile? Amsler suggests that ‘there is something inherently transformative about criticality’ (2011, 60); it is this discourse of transformation which is aimed at supporting the value of legal education. It could be argued that students’ transformation embraces a complex process, not least because learning theories suggest that generally an adult student’s platform of knowledge is not a blank slate; thus, in order to trigger learning, teaching strategies should be designed to challenge prior knowledge (Fry and Marshall 2008). This recommendation is placed within what has been recognised as a ‘student-centred’ approach (e.g. Blackie et al. 2010), which is expected to facilitate a style of learning where students are active participants in their own learning experience, rather than passively absorbing imparted information. This concept of active learning is important, mainly because it fits well with the ethos of critical pedagogy, which endorses transformation and production of knowledge rather than the mere consumption of it (Giroux 2012).

However, although ‘transformation’ can be explained in terms of adult-learning theories and critical pedagogy, it is arguably less present in the ambit of legal teaching, that is in traditional legal studies. It is for this reason that in the 1980s legal education saw the emergence of critical legal thinking, where it aimed at rejecting the ‘black-letter law tradition’ which aspired to ‘value neutrality’ (Fitzpatrick and Hunt 1990). Within this context the authority of the law has to be taken at face value, and therefore students are not required, as Barnett says, to ‘stretch themselves [to] grapple with challenges of developing their own take on matters’ (2004, 256). A review by Lacey (1985) on the function of the textbook in legal education well illustrates this teaching framework. For example, textbooks such as the one by Glanville Williams, 1983, although cited in judicial debates, merely provided a doctrinal guide to the discipline with little scope for critical evaluation; no rationale was given to clarify the reasoning behind the substantive law (the principles of law) (1985, 454-6). Clarkson and Keating’s textbook, 1984, introduced a new dimension to the study of the law; they entitled their textbook *Text and Materials*, which is very much suggestive of what the students can expect to find in their text: an explanation of the doctrine by drawing upon a variety of sources, making the reading to some extent interdisciplinary and comparative. However, although such a reading could provide a rounder understanding of the topic, Lacey argues that the authors give little guidance on how to engage with the many critical standpoints presented, and therefore this may leave students with a ‘feeling of despair’ (1985, 457). The contribution of these authors to the discipline of criminal law is invaluable while these textbooks are still in wide circulation and used as core reading in law programmes; yet, the question that comes to mind is: to what extent does the knowledge generated out of these texts enhance students’ broader perspectives? Indeed, Morgan and Wells have argued that ‘students at UK law schools will, by the end of their first year, have assimilated in to a way of thinking about law which is rule-bound and rational, partial and positivistic’ (cited in Wells 2014, 3).

Critical legal teaching, on the other hand, has been engaged in uncovering the ‘illusoriness of certain legal appearances’, the politically loaded construction of legal assumptions, while attempting to better bridge the gap between the textbook (theory) and reality (Thomson 1990). Moreover, Thomson explains that the ‘critical legal movement is characterised by a commitment to the idea of individual liberation [...] in the name of human emancipation it aims to subvert the legal in order to transcend it’ (190). Indeed, Lacey and Wells’ groundbreaking 1990 textbook *Reconstructing Criminal Law* meant to do just that. In

her presentation to the ‘Re-Imagining the Teaching of Criminal Law’ Birmingham workshop in 2014, Celia Wells noted that ‘I am clear though that *Reconstructing Criminal Law* was a Grand Design. It was attempting to produce something new not for the sake of it but because there wasn’t anything available that represented criminal law as we understood it [...]’ (Wells 2014, 8). Understanding criminal law through the eyes of Lacey and Wells means that not only is doctrine integrated within a wider socio-political feminist context, but also the text demonstrates how criminal law has been constructed ‘as a social normative system’ where it ‘operates within a social space’ characterised by the ‘setting down standards of conduct’ and their subsequent legal enforcement (2014, 9). Whichever critical legal approach is pursued, all aim at encouraging the recognition ‘that “facts” are negotiable, constructible and open to alternative usage’ (Thomas 2000, 7); in other words, the ‘law’s empire’ must be challenged (7).

It could be argued that critical pedagogy and critical legal thinking complement each other, both gearing towards achieving a sense of ‘seeing things differently’ by challenging the way ‘things’ have been understood so far. Greene talks about how this sort of education allows us to encounter ‘alternative possibilities of existing, of being human, of relating to others, of *being* other’, and how this in turn, ‘open[s] new perspectives on what is assumed to be “reality”’ (italic original, 1993, 214). Moreover, on the one hand, critical pedagogy opens up the possibility to actively and critically produce knowledge rather than receive it, as defined by ‘authority’ (Kember 2001); while on the other hand, critical legal education enables ‘bringing to consciousness the taken for granted in and about law’ (Thomson 1990, 194) so that authentic understanding and critical reflection can be produced. In the teaching of criminal law, this approach should come naturally, not least because the doctrine of criminal law is intrinsically moral and socio-politically constructed; whilst the English common law in itself is shaped by slowly evolving social and political standards aimed at the safeguarding of security, it is arguable whose interests and morals the law attempts to reflect. Indeed, the empowerment gained through this challenging of knowledge and the ways it may be formed can be deemed ‘transformative’ (Meyer and Land 2005). Pedagogical theory suggests that such an approach can bring about ‘a fundamental growth in the person of the student’ (Barnett 2008, cited in Blackie et al. 2010, 639). This is what Barnett calls ‘transformative experience’: the key moment when the student realises that she has accomplished an understanding, which in turn, will change the fundamentals of her knowledge for ever (2008, cited in Blackie et al. 2010, 641). For example, most of my

students, when first introduced to the doctrine of ‘consent’ as a defence to non-fatal offences against the person such as wounding and causing grievous bodily harm, might take at face value judges’ reasoning for their permissiveness concerning certain behaviours towards others. In this context, legal critical theory will encourage students to reflect on why it is, for example, that violent sport such as boxing, is an exception to the legal rule that a person cannot consent to certain levels of harm? The submission that judges’ reasoning can be affected by social values which were constructed in the 19th century is a revelation for many students, and this in turn might affect, as explained by Barnett, ‘students’ sense of themselves and of their relationship with the world around them’ (2004, 253). As a student once told me: ‘I never thought about that in this way...’.

Transformation of knowledge, of ways of thinking, of one’s being and the self - all these require an active engagement with the educational process; reflection is of paramount importance (bell hooks 1994). However, active and independent learning has to be recognised within the wider context of ‘community of practice’ (Wingate 2007; Fry and Marshall 2008). In other words, this perspective argues that engagement with others fosters collective understanding, hence a participative process of learning. This process involves an active search and production of new information which is meant to strengthen the sense of belonging and participation within a group. Indeed, it could be argued that transformative practice is fuelled by encounters which in turn expose students to ‘dilemmas and uncertainties’ (Barnett 2004, 257). Transformation inevitably necessitates engagement with disagreement; Skelton suggests that ‘by listening to many different voices [...] there is potential to deepen our understanding [...]’ (2005, cited in McArthur 2010, 497). In the case of Birkbeck’s non-traditional law students, the class becomes a place where students encounter controversial realities; one such memorable occasion was when discussing the Female Genital Mutilation Act 2003: two female students, who grew up in Ghana, explained to the class what it meant not to be circumcised (for boys and girls) in a society which endorsed such a custom. The choice of the two families to resist the practice when still living in Ghana was seen as an act of liberation and empowerment by the rest of the students; however, the ordeal and discrimination that the two girls, while growing up in Ghana, had to go through due to this choice, was a reality that most of the class had not taken into consideration before. This has introduced another dimension to an understanding which has been mainly shaped upon Western morals and ideals.

It could be argued that challenging the ‘law empire’ and the ways ‘justice’ and ‘ethics’ have been constructed by traditional legal education generates what has been termed by pedagogical literature as ‘threshold concepts’; these are fundamental to the process of students’ transformation. As explained by Meyer and Land, a threshold concept ‘can be considered as akin to a portal, opening up a new and previously inaccessible way of thinking about something’ (2005, 1). They argue that ‘as a consequence of comprehending a threshold concept there may thus be a transformed internal view of subject matter, subject landscape, or even world view’ (2005, 2). It could be argued that the non-traditional student will be much more challenged and resist many of the critical discussions coming out of threshold concepts because of their prior knowledge grounded in life experiences, perceptions, opinion and stereotypes. Meyer and Land suggest that some students might find this learning experience ‘intellectually absurd’ (2005, 2). For example, many students will find it intellectually absurd to reflect on a feminist argument which suggests that the urgency to separate Mary and Jodie, baby Siamese twins sharing the same abdomen,⁶ demonstrates a wider social expectation with regard to socially approved ‘conventional’ aesthetical physical looks (Hunter et al. 2010). Many of my students will struggle to rationalise arguments against the conjoined twins’ surgical separation arguing that in a highly scientific and medically advanced society omitting to intervene is rather irrational.

Another example of a threshold concept where students’ perception might be challenged is with the case of marital rape. The concept of marital rape is a grounded one and despite its late materialisation in the 1990s⁷ most of my students find this concept obvious and morally justifiable. Yet, in a multicultural London, I have also had male and female students with religious and/or cultural backgrounds informed by social values shaped by fundamentally patriarchal and sexist principles. Hence, for these students, the idea that a sexual marital relationship should be based upon an explicit consensual agreement between the ‘parties’, is rather odd, not least because of the perceived role and status that women have and are expected to ‘play’ in their own culture. I found that in this particular example, students endorsing either of the two views resist grappling with the opposite standpoint. But marital rape is not the only concept that students find difficult to digest; when introduced to

⁶ *Re A (Conjoined twins)* [2001] 2 W.L.R. 480. In this case law, the parents of the twins came from India for a specialised advice. However, because they refused to have the twins surgically separated due to their religious beliefs, the doctors sought a legal authorisation, which was granted.

⁷ *R v R* [1992] 1 AC 599 (HL) [1991] 3 WLR 767. The legal principle on that regard has introduced the notion that even within married couples, an un-consensual sexual intercourse can be classified as rape.

the case law concerning a battered wife who killed her abusive husband, many students refuse to accept the psychiatrically proven symptoms of what is termed as the battered woman syndrome where a long-term battered person becomes helpless and psychologically dependant on their abuser. In the case law of Mrs Ahluwalia, she was physically and emotionally battered by her husband for more than ten years; the story ended tragically one evening when she set her husband alight while he was sleeping.⁸ The range of views in this case is wide and complex, but I found that students tend to condemn Ahluwalia's inability to move out of the matrimonial home and seek help, rather than address the actual crime that she committed. Some students, although not many, simply cannot see the gravity of the situation where a woman is being battered by her husband; this, they will consider, is part of the matrimonial 'bundle'. Many other students, however, will hold the completely opposite view where the question that usually follows is: 'so why didn't she leave?'. On two separate occasions a male and a female student confided that they had been battered by their partners in the past but that they could not empathise with the case of Ahluwalia; by drawing upon their own personal experiences, they rejected the idea that Ahluwalia could not have been in the psychological position to take charge on her life (as they did) and leave her husband. Despite the obvious tension created in class following such confrontations with students' own knowledge and perception, the awareness generated as a consequence is invaluable. Indeed, it could be argued that the critical approach to learning discussed in this paper is further reflected in a number of commitments taken by Birkbeck's law students; the most recent being the participation in the LSE-Featherstone Sexual Orientation and Gender Identity Moot 2015-16,⁹ where students had to deal with legal problems related to issues faced by the LGBT community.

Conclusion

The question guiding this paper has been concerned with the value of the QLD and in particular, the teaching of criminal law: what do students get out of the study of a discipline which is to a great extent remote from its application in real life? This question has been addressed within the context of Birkbeck's non-traditional law students, arguing that because

⁸ *R v Ahluwalia* [1993] 96 Cr. App. R. 133.

⁹ See <http://www.bbk.ac.uk/law/news/student-members-of-the-school-of-law-mooting-society-participate-in-lses-lgbt-moot>

of their varied and wide personal and professional backgrounds, their reasons for embarking on such a demanding journey, and the competitively complex legal market- for all these reasons, legal education needs not only be intellectually worthwhile but it should also have an employability bearing. In reality however, the question set above does not only concern the non-traditional student. Indeed, law students across the country, whether 'traditional' or not, inevitably share upon graduation the same job market. The roundness of a student's academic formation will indeed affect, as suggested by the solicitors mentioned earlier, their employment prospects: merely reciting the doctrine is not good enough anymore. Because HE studies are seen now as a commodity, as a 'good' that everyone has a right to get hold of, there is a concern that legal education will merely pay lip service to the minimum requirements set by the Joint Statement (1999). This does not have to be the case, and I submit that it is in the promotion of citizenship where critical pedagogy can assist. The current educational context does not necessarily needs to be seen as compromising what has been termed as students' transformative practice, that is, a learning experience which attempts to introduce students to other 'realities', challenge the status quo and give students a 'voice', leading to awareness, understanding, tolerance and more generally, a potential for seeing things differently. Amsler suggests that critical pedagogy does not necessarily have to be seen as facilitating 'an instrumental form of knowledge that guides political actions', rather, it could merely promote learning 'to make sense out of complex situations, or to become open to difference and contradictions, and to the unknown'(2011, 69). Moreover, I argue that because the nature of criminal law is intrinsically morally, socially and politically challenging, especially within a context of the critical legal tradition, its place within the QLD teaching is invaluable, not the least because it encourages the questioning of what has been constructed as 'authority'. Indeed, Foucault reminds us that the nature of criticism should 'bring a work, a book, a sentence, an idea to life [...] It would multiply not judgements but signs of existence' (1997, 323). Critical pedagogy and critical legal thinking allow students to question their own personal world views and to recognise other realities than their own. As put by Loizidou, 'life, our life, may exceed the borders of the law' (2012, 181).

References

Amsler S. 2011. "Revalorizing the critical attitude for critical education." *Journal for Critical Education Policy Studies*, 9, 2: 60-76.

Amsler S. 2010. Education as a critical practice. In *Why critical pedagogy and popular education matter today*, edited by Amsler S., Canaan J.E., Cowden S., Motta S., and Singh G. C-SAP: Higher Education Academy Subject Network for Sociology, Anthropology, Politics.

Archer L., and Hutching M. 2000. "Battering yourself?" *British Journal of Sociology of Education*, 21: 4.

Barnett R. 2004. "Learning for an unknown future." *Higher Education Research and Development*, 23, 3: 247-260.

bell hooks. 1994. *Teaching to transgress*. Abingdon: Routledge.

Birkbeck London University. 2016. *Students Profile Year on Year*. Online at <http://tableau.birkbeck.ac.uk/#/views/StudentRecruitment-Studentprofileyear-on-year/Studentprofileyear-on-year?.iid=2> (accessed 12 April 2016).

Birkbeck London University. 2016a. *Mission Statement*. Online at <http://www.bbk.ac.uk/about-us/mission> (accessed 29 February 2016).

Birkbeck London University. 2016b. *Students testimonies*. Online at <http://www.bbk.ac.uk/law/study-here/student-profiles?next=10&prev=0> (accessed 29 February 2016).

Birkbeck London University. 2016c. *Prospective Students*. Online at <http://www.bbk.ac.uk/prospective/home/> accessed 29 February 2016).

Birkbeck London University. 2016d. *Why Study at Birkbeck School of Law*. Online at <http://www.bbk.ac.uk/law/study-here/why-choose-birkbeck> (accessed 14 April 2016).

Birkbeck London University. 2016e. *Birkbeck School of Law Brochure*.

Birkbeck London University. 2015. *Access Agreement, 2015/16, with the Office of Fair Access*. Online at <https://www.offa.org.uk/agreements/Birkbeck%20College.pdf> (accessed 01 March 2016).

Birkbeck London University. 2015a. *Centre for Transformative Practice in Teaching and Learning*. Online at <http://www.bbk.ac.uk/learning-and-teaching/> (accessed 14 April 2016).

Birkbeck London University. 2015b. *Student Engagement Strategy 2015-2020*. Online at <http://www.bbk.ac.uk/committees/committee-papers/active-committees-and-working-groups/student-engagement-and-widening-participation-committee/sewpc-committee-papers/27-january-2016/SEWPC%202015%2008%20Student%20Engagement%20Strategy.pdf> (accessed 01 Mar 2016).

Birkbeck London University. 2015c. *Student Engagement Committee 1 October 2015 REPORT*. Online at <http://www.bbk.ac.uk/committees/committee-papers/active-committees-and-working-groups/academic-board/academic-board-papers/5-november-2015/AB%202015%2005%20Report%20of%20the%20Student%20Engagement%20Committee.pdf> (accessed 01 Mar 2016).

Birkbeck London University. 2013. The History of Birkbeck. *About Birkbeck*. Online at <http://www.bbk.ac.uk/about-us/history/> (accessed 31 July 2014).

Birkbeck London University. 2013a. Widening Access to Higher Education. *About Birkbeck*. Online at <http://www.bbk.ac.uk/about-us/widening-access> (accessed 31 July 2014).

Birkbeck London University. 2015. Student Engagement and Widening Participation Committee. Committee Papers 7 May 2015. *Student Engagement Strategy*. Online at <http://www.bbk.ac.uk/committees/committee-papers/active-committees-and-working-groups/student-engagement-and-widening-participation-committee/sewpc-committee-papers/7-may-2015>. (accessed 13 April 2016).

Blackie M.A.L, Case J.M, and Jawitz J. 2010. "Student-Centredness: the link between transforming students and transforming ourselves." *Teaching in Higher Education* 15, n.6: 637-46.

Brown R. 2015. "The Marketisation of Higher Education: Issues and Ironies." *News Vistas* 1, issue 1. Online at http://www.uwl.ac.uk/sites/default/files/Departments/Research/new_vistas/vol1_iss1/vol1_iss1_art1_23April2015.pdf (accessed 14 April 2016).

BSB, Bar Standard Board. 2016. *Academic Stage*. Online at <https://www.barstandardsboard.org.uk/qualifying-as-a-barrister/academic-stage/> (accessed 28 February 2016).

BSB, Bar Standard Board. 2016. *Bar Professional Training Course*. Online at <https://www.barstandardsboard.org.uk/qualifying-as-a-barrister/bar-professional-training-course/> (28 February 2016).

Canaan J.E. 2013. "Resisting the English Neoliberalising University: What Critical Pedagogy can offer." *Journal for Critical Education Policy Studies* 11, n.2. Online at <http://www.jceps.com/wp-content/uploads/PDFs/11-2-02.pdf> (accessed 11 August 2014).

Cottrell S. 2001. *Teaching Study Skills and Supporting Learning*. Basingstoke: Palgrave Macmillan

Fitzpatrick B. 2013. "Should Criminal Law Be Part of the Qualifying Law Degree?" *Crim Up North: A new blog about Criminal Law and Criminal Justice*, Online at <https://benfitzpatrick2.wordpress.com/2013/12/17/should-criminal-law-be-part-of-the-qualifying-law-degree/> (accessed 19 August 2015).

Fitzpatrick B. 2013a. "Criminal Law and Module Design," *Crim Up North: A new blog about Criminal Law and Criminal Justice*, Online at <https://benfitzpatrick1.wordpress.com/2013/12/09/criminal-law-and-module-design/> (accessed 28 February 2016).

Fitzpatrick B. 2013b. "Law Degrees And 'Employability'." *Crim Up North: A new blog about Criminal Law and Criminal Justice*, Online at <https://benfitzpatrick1.wordpress.com/2013/11/29/law-degrees-and-employability/> (accessed 28 February 2016).

Fitzpatrick P., and Hunt A. 1990. *Critical Legal Studies*. Basil Blackwell.

Foucault M. 2000 [1997]. The Masked Philosopher. In *Ethics: Subjectivity and Truth. The Essential Works of Michel Foucault 1954-1984*, edited by Rabinow P. Volume One, 321-328. Lane: Penguin.

Freire P. 1974. *Education: The Practice of Freedom*. London: Writers and Readers Publishing Cooperative.

Fry H., Ketteridge S., and Marshall S. 2008. Understanding Student Learning. In *A Handbook for Teaching and Learning in Higher Education: Enhancing Academic Practice*, edited by Fry H., Ketteridge S., and Marshall S, 8-26. London: Routledge.

Giroux H. 2012. *On Critical Pedagogy*. NY, London: Continuum International Publishing Group.

Goodnough K. 2006. "Enhancing pedagogical content knowledge through self-study: an exploration of problem-based learning." *Teaching in Higher Education* 11, n.3: 301-218.

- Green M. 1993. "Diversity and Inclusion: Towards a Curriculum for Human Beings." *Teacher College Record* 95, n.2.
- Hardee, M. 2014. "Career expectations of students on Qualifying Law Degrees in England and Wales." *Higher Education Academy*. Online at https://www.heacademy.ac.uk/sites/default/files/resources/hardee_interimreport_2014final.pdf (accessed 01 Mar 2016).
- Henry B., Saunders K., and Burrows M. 2014. Reflection from Practice. Presented in *Re-Imagining the Teaching of Criminal Law*. Birmingham workshop 2014
- Hoskins S.L., and Newstead S.E. 2008. Encouraging Student Learning. In .) *A Handbook for Teaching and Learning in Higher Education: Enhancing Academic Practice*, edited by Fry H., Ketteridge S., and Marshall S. London: Routledge.
- Hunter R.C., McGlynn C., and Rackley E. 2010. *Feminist Judgments: From Theory to Practice*. Oxford: Hart.
- Joint Statement. 1999. *Joint Statement of the academic stage of training*. Online at <http://www.sra.org.uk/students/academic-stage-joint-statement-bsb-law-society.page> (accessed 15 April 2016).
- Jones R. 2008. "New to widening participation? An overview of research." *Higher Education Academy, EvidenceNet*. Online at https://www.heacademy.ac.uk/sites/default/files/new_to_widening_participation_an_overview_of_research.pdf (accessed 29 Feb 2016).
- Kember D. 2001. "Belief about knowledge and the process of teaching and learning as a Factor in Adjusting to Study in HE." *Studies in HE* 26, no.2.
- Lacey N. 1985. "The Territory of the Criminal Law." *Oxford Journal of Legal Studies* 5, n.3: 453-462.
- Leathwood C., and O'Connell P. 2003. "'It's a struggle': the construction of the 'new student' in higher education." *Journal of Education Policy* 18:6.
- LETR, Legal Education and Training Review. 2013. *Setting Standards: The future of legal services education and training regulation in England and Wales*. Online at <http://letr.org.uk/the-report/index.html> (accesses 01 March 2016).

Loizidou E. 2012. Before the law, encounters at the borderline. In *New Critical Legal Thinking*, edited by Stone M., Wall I.R., and Douzinas C. London: Routledge.

Meyer J., and Land R. 2005. "Threshold Concepts and Troublesome Knowledge: Linkages to Ways of Thinking and Practising within the Disciplines." *Enhancing Teaching-Learning Environments in undergraduate Courses Project*. Occasional Report 4. Online at <http://www.etl.tla.ed.ac.uk/docs/ETLreport4.pdf> (accessed 15 Aug 2014).

McArthur J. 2010. "Achieving social justice within and through higher education: the challenge for critical pedagogy." *Teaching in Higher Education* 15, n.5: 493-504.

Munro V., and Shah S. 2010. R v Dhaliwal- Judgment. In Hunter R.C., McGlynn C. and Rackley E. (ed.) *Feminist Judgments: From Theory to Practice*. Oxford: Hart.

QAA, Quality Assurance Agency. 2015. *Subject Benchmark Statement: Law*. Online at <http://www.qaa.ac.uk/publications/information-and-guidance/publication?PubID=2966#.VtVf5pyLShc> (accessed 01 Mar 2016).

Richardson J.T.E. 2005. "Students' Approaches to Learning and Teachers' Approaches to Teaching in Higher Education." *Educational Psychology* 25, n.6: 673-680.

Smith P., Whittle R. and P. Griffith. 2012. LawSync: navigating the 'blue oceans' within the 'emerging' legal services markets. *Legal Information Management*, 12, n.3: 203-209. Online at http://shura.shu.ac.uk/5528/5/LawSync_for_LIM.pdf (accessed 14 April 2016).

Sommerland H., Harris-Short S., Vaughan S., Young R. 2015. *The Futures of Legal Education and the Legal Profession*. Oxford and Portland: Hart.

Sommerland H. 2007. "Researching and Theorizing the Process of Professional Identity Formation." *Journal of law and Society*, 34, 2: 190-217.

SRA, Solicitor Regulatory Authority. 2014. Academic Stage of Education and Training. Online at <http://www.sra.org.uk/students/academic-stage.page> (accessed 28 February 2016).

SRA, Solicitor Regulation Authority. 2014a. Training Regulation. Online at <http://www.sra.org.uk/solicitors/handbook/trainingregs2014/part1/content.page> (accessed 28 February 2016).

Thomas P. 2010. *Learning About Teaching Law*. Guidance Notes, National Centre for Legal Education. Coventry: University of Warwick.

Thomson A. 1990. Critical Legal Education in Britain. In Fitzpatrick P. and Hunt A. (ed.) *Critical Legal Studies*. London: Basil Blackwell.

Wells C. 2014. Grand Designs: Deconstructing and Reconstructing Criminal Law. CEPLER Working Paper Series, for *Re-Imagining the Teaching of Criminal Law*, Birmingham. Online at <http://www.birmingham.ac.uk/facilities/CEPLER/working-papers/index.aspx> (Accessed 19 August 2015).

Wells C., and Quick O. 2010 [1990]. *Lacey, Wells and Quick Reconstructing Criminal Law: Text and Materials*. Cambridge University Press.

Wingate U. 2007. "A Framework for Transition: Supporting 'Learning to Learn' in Higher Education." *Higher Education Quarterly* 61, n.3: 391-405.

"The best lawyers are not law graduates, claims judge". 2012. *The Telegraph*, July 8. Online at <http://www.telegraph.co.uk/news/uknews/law-and-order/9384619/The-best-lawyers-are-not-law-graduates-claims-judge.html> (accessed 28 February 2016).

Female Genital Mutilation Act 2003 c.31

Re A (Conjoined twins) [2001] 2 W.L.R. 480

R v Ahluwalia [1993] 96 Cr. App. R. 133

R v R [1992] 1 AC 599 (HL) [1991] 3 WLR 767